# Malaysia Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPLICATION NO W-04–483–10 OF 2011

B

RAUS SHARIF PCA, ALIZATUL KHAIR JCA AND MAH WENG KWAI J

10 AUGUST 2012

C

*Evidence — Documentary evidence — Certificate — Failure to produce documentary evidence to support reasons cited in architect's certificate — Whether adverse inference should be invoked against appellant — Evidence Act 1950 s 114(g)*

D

*Land Law — Housing developers — Damages for late delivery — Liquidated and ascertained damages — Whether appellant was entitled to rely on architect's certificate for late delivery — Whether architect's certificate final, conclusive and binding on respondent — Whether appellant failed to produce documentary evidence to support reasons cited in architect's certificate — Whether architect's letter should be accepted as valid architect's certificate*

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The appellant developer delayed completion of the construction and vacant delivery of an apartment unit ('the unit') purchased by the respondent. It was a term of the sale and purchase agreement ('the SPA') entered into between the parties that in the event of delay in the delivery of vacant possession the appellant would pay liquidated and ascertained damages ('LAD'). The respondent claimed LAD in the sum of RM29,991.95 for the delay of 732 days in the delivery of vacant possession. The appellant denied liability for late delivery of the unit by relying on its architect's certificate ('AC') pursuant to cl 30 of the SPA, which granted the architect the right to grant the appellant an extension of time with the architect's decision to grant such extension of time to be regarded as final, conclusive and binding on the respondent. The AC in the present case cited delays caused by the contractor, act of God, inclement weather and shortage of materials as the reasons for the delay. The respondent argued that the appellant's letter could not be accepted as a valid certificate for the purposes of cl 30 of the SPA because, inter alia, the reasons cited therein were not reasons contemplated under cl 30, a force majeure provision, and because the appellant had failed to produce documentary evidence necessary to support any of the reasons set out in the AC. The High Court judge found that the reasons stated in the AC were not valid and could not be substantiated. Consequently, the High Court held that the AC was not conclusive and final

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and found in favour of the respondent. This was the appellant's appeal against that decision.

**Held**, allowing the appeal with costs:

(1) Notwithstanding that time was to be essence of the SPA, cl 22.1 of the SPA clearly gave the architect the power to grant an extension of time in situations deemed appropriate by the architect. The force majeure clause in the present case, cl 30, was not limited to the general notion of delay caused by 'act of God, strikes, lockouts, riots, civil commotion, general chaos and inclement weather' only. The cases cited by the respondent in support of his case were of no assistance because the cl 30 in the present case, unlike those cases cited, went on to provide that the AC was final, conclusive and binding on the respondent. As such, the AC in the present case was final and conclusive and binding on the respondent and the High Court judge fell into error when she rejected the AC as being invalid. It is trite that the court should not intervene to rewrite the terms and conditions of the SPA willingly accepted by the parties when they entered into the agreement (see paras 12(b)–(c) & (g)).

(2) It was obvious that the respondent in this case had not requested for particulars or documents from the appellant and/or the architect to show that there was no basis for the architect to issue the certificate. In the face of the AC and the conclusive and binding nature of cl 30 it would have been incumbent on the respondent to apply for further and better particulars. Unfortunately, the respondent did not do so. As such, an adverse inference could not be invoked against the appellant under s 114(g) of the Evidence Act 1950 for having failed to produce documents in court. Suffice to say that in the present case unless the respondent could demonstrate that the AC issued was manifestly erroneously or was issued with mala fides that it would have to be accepted by the court (see para 12(e)).

(3) There was no ground for the respondent to impugn the AC on the basis that it was in the form of a letter from the architect. As there was no provision in the SPA or under the law for the AC issued to be in compliance with a certain standard format, there was no reason why the architect's letter should not be accepted as a valid AC (see para 12(n)).

**[Bahasa Malaysia summary**

Perayu pemaju telah melengahkan pembinaan dan milikan kosong unit apartmen ('unit tersebut') telah dibeli oleh responden. Adalah terma perjanjian jual beli ('PJB tersebut') yang dimasuki antara pihak-pihak bahawa sekiranya berlaku kelewatan dalam serahan milikan kosong perayu akan membayar ganti rugi boleh dikira dan ditentukan ('GRBDD'). Responden mendakwa GRBDD itu berjumlah RM29,991.95 kerana kelewatan 732 hari dalam

serahan milikan kosong. Perayu menafikan liabiliti kerana kelewatan serahan unit tersebut dengan bergantung kepada sijil arkitek ('SA') menurut fasal 30 PJB tersebut, yang memberikan arkitek hak untuk memberikan perayu lanjutan masa dengan keputusan arkitek untuk memberikan lanjutan masa tersebut yang dianggap sebagai muktamad, konklusif dan mengikat atas responden. SA dalam kes ini menyatakan kelewatan disebabkan oleh kontraktor, ketentuan Tuhan, cuaca buruk dan kekurangan bahan sebagai sebab-sebab kelewatan. Responden berhujah bahawa surat perayu tidak boleh diterima sebagai sijil sah bagi tujuan fasal 30 PJB kerana, antara lain, sebab-sebab yang dipetik bukan sebab-sebab yang dijangkakan di bawah fasal 30, peruntukan *force majeure*, dan oleh kerana perayu telah gagal untuk mengemukakan keterangan dokumentar yang perlu bagi menyokong mana-mana sebab yang dinyatakan dalam SA tersebut. Hakim Mahkamah Tinggi mendapati bahawa sebab-sebab yang dinyatakan dalam SA tersebut tidak sah dan tidak boleh dikekalkan. Berikutan itu, Mahkamah Tinggi memutuskan bahawa SA tersebut tidak konklusif dan muktamad dan membuat keputusan memihak kepada responden. Ini adalah rayuan perayu terhadap keputusan itu.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) Walaupun masa adalah inti pati PJB tersebut, fasal 22.1 PJB tersebut jelas memberikan arkitek tersebut kuasa untuk memberikan lanjutan masa dalam keadaan yang dianggap sesuai oleh arkitek tersebut. Fasal 'force majeure' dalam kes ini, iaitu fasal 30, tidak terhad kepada andaian am kelewatan disebabkan oleh 'ketentuan Tuhan, mogok, sekat masuk kerja, rusuhan, kekecohan sivil, keadaan huru-hara umum dan cuaca buruk' sahaja. Kes-kes yang dipetik oleh responden menyokong kesnya tidak membantu kerana fasal 30 dalam kes ini, yang tidak seperti kes-kes yang dipetik, selanjutnya mengemukakan bahawa SA tersebut adalah muktamad dan mengikat atas responden. Oleh itu, SA tersebut dalam kes ini adalah muktamad dan konklusif dan mengikat responden dan hakim Mahkamah Tinggi terkhilaf apabila menolak SA tersebut sebagai tidak sah. Adalah nyata bahawa mahkamah tidak patut campur tangan untuk menulis semula terma dan syarat PJB yang telah diterima secara sukarela oleh pihak-pihak apabila mereka memasuki perjanjian tersebut (lihat perenggan 12(b)–(c) & (g)).

(2) Adalah jelas bahawa responden dalam kes ini tidak meminta butiran atau dokumen daripada perayu dan/atau arkitek tersebut untuk menunjukkan bahawa tiada asas untuk arkitek tersebut mengeluarkan sijil. Berasaskan SA tersebut dan sifat konklusif dan mengikat fasal 30 adalah wajib untuk responden memohon butiran selanjutnya dan wajar. Namun begitu, responden tidak berbuat demikian, Oleh itu, inferens bertentangan tidak boleh digunakan terhadap perayu di bawah s 114(g) Akta Keterangan 1950 kerana gagal mengemukakan dokumen di

mahkamah. Adalah mencukupi untuk mengatakan bahawa dalam kes ini kecuali responden boleh menunjukkan bahawa SA tersebut yang dikeluarkan mempunyai banyak kesilapan atau telah dikeluarkan dengan niat jahat sehinggakan ia terpaksa diterima oleh mahkamah (lihat perenggan 12(e)).

(3) Tiada alasan untuk responden mempersoalkan SA tersebut atas dasar bahawa ia dalam bentuk surat daripada arkitek tersebut. Oleh kerana tiada peruntukan dalam PJB tersebut atau di bawah undang-undang untuk SA tersebut dikeluarkan agar mematuhi format piawai tertentu, tiada sebab kenapa surat arkitek tersebut tidak patut diterima sebagai SA yang sah (lihat perenggan 12(n)).]

**Notes**

For cases on certificate, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1409–1413.

For cases on damages for late delivery, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3368–3375.

**Cases referred to**

*Araprop Development Sdn Bhd v Leong Chee Kong & Anor* [2008] 1 MLJ 783; [2008] 1 CLJ 135, CA (refd)

*Bangkok Bank Ltd v Cheng Lip Kwong* [1990] 2 MLJ 5, HC (refd)

*Bank of Tokyo-Mitsubishi (Malaysia) Bhd v Sim Lim Holdings Bhd & Ors* [2001] MLJU 125; [2001] 2 CLJ 474, HC (refd)

*Central Bank of India Ltd v The Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288, SC (refd)

*Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587; [1997] 1 CLJ 23, CA (refd)

*Getaran Unggul Sdn Bhd v Syed Ahamed bin Mohamed Ghani and others* [2004] MLJU 485; [2004] 1 LNS 436, HC (refd)

*Global Destar (M) Sdn Bhd v Kuala Lumpur Glass Manufacturers Co Sdn Bhd* [2007] MLJU 91; [2007] 1 LNS 54, HC (refd)

*Golden Bay Realty Pte Ltd v Orchard Twelve Investments Pte Ltd* [1989] 2 MLJ 70; [1990] 3 CLJ (Rep) 499, CA (refd)

*Intan Payong Sdn Bhd v Goh Saw Chan Sdn Bhd* [2005] 1 MLJ 311; [2004] 1 LNS 537, HC (refd)

**Legislation referred to**

Evidence Act 1950 s 114(g)

**Appeal from**: Summons No R2–12–25 of 2011 (High Court, Kuala Lumpur)

*Andrew Davis (Andrew Davis & Co) for the appellant.*
*Dhyana Shila (Wilfred Dhyan & Co) for the respondent.*

**Mah Weng Kwai J (delivering judgment of the court):**

THE BRIEF FACTS

**[1]** On 30 July 2003, the respondent entered into a sale and purchase agreement with the appellant, a developer, to purchase an apartment ('the unit') at the price of RM149,550.

**[2]** The appellant was to complete the construction of the unit and deliver vacant possession to the respondent within 36 months from the date of the sale and purchase agreement that is, by 30 July 06.

**[3]** In the event of delay in the delivery of vacant possession the appellant agreed to pay liquidated and ascertained damages calculated from day to day at the rate of 10%pa on the purchase price paid.

**[4]** The appellant delivered vacant possession on 1 August 2008, that is, after a delay of 732 days. Dewan Bandaraya Kuala Lumpur issued the *'Perakuan Menduduki'* on 26 August 2009.

THE CLAIM

**[5]** The respondent claimed for the sum of RM29,991.95 as the liquidated and ascertained damages for the delay of 732 days in the delivery of vacant possession.

THE DEFENCE

**[6]** The appellant denied liability for the late delivery of the unit on the strength of its architect's certificate dated 12 September 2008 (exh D9) (the certificate) confirming that the appellant was entitled to an extension of time up to 29 August 2008.

THE DECISION OF THE COURT

**[7]** Upon a reading of the *Rekod Rayuan*, the written submissions of counsel for the appellant and respondent and upon hearing the oral submissions of counsel aforesaid, the court was unanimous in its decision to allow the appeal with costs.

THE GROUNDS OF DECISION

**[8]** The only issue that was to be decided in this appeal was whether the

appellant was entitled in law to rely on the certificate pursuant to cl 30 of the sale and purchase agreement to the effect that the architect's decision to grant the extension of time to the appellant was final and conclusive and binding on the respondent.

**[9]** Clause 30 of the sale and purchase agreement provides:

> Notwithstanding anything to the contrary herein contained the vendor shall not be liable for any loss or damage to the Purchaser for any failure to fulfill any of terms of this Agreement if such fulfillment is delayed, hindered or prevented by force majeure including but not limited to the Appropriate Authorities' delay in its approval, permits or licence or any other government or statutory bodies' delay not within the Vendor's control or to any delays caused by the contracior(s) involved in the construction or development of the Integrated Development, Acts of God, strikes, lockouts, riots, civil commotion, general chaos, inclement weather, land slides/slips or any other circumstances of whatsoever nature beyond the control of the Vendor or by any reasons of the Purchaser requiring alterations or additions to the Parcel. *All decisions of the Vendor's Architect as to the reasons for any delay or any confirmation or statements by the Vendor's Architect of the introduction or amendment of the relevant laws, by-laws, rules or regulations resulting in the new or extra charges payable by the Purchaser shall be final and conclusive and binding upon the Purchaser*. (Emphasis added.)

**[10]** The appellant's architect when issuing the certificate referred to cl 30 before setting out his reasons for granting the extension of time. It will be useful to set out in full the contents of the certificate at this juncture. The certificate reads:

> Our Ref: AJS 2-103/WW/MLP/L-33
>
> Date: 12th September 2008
>
> MALAYSIA LAND PROPERTIES SDN BHD
>
> No. 7, 31st Floor Menara May,
>
> Jalan Munshi Abdullah
>
> 50100 Kuala Lumpur
>
> Attn: Mr. Ho Chee Leonq
>
> Dear Sir,
>
> CADANGAN PEMBANGUNAN YANG MENGANDUNGI
>
> BLOKB
>
> (1) 21 TINGKAT SERVIS APARTMENT (445 UNIT)
>
> Dl ATAS SEBAHAGIAN LOT 48626, PLAZA DAMAS, JALAN
>
> HARTAMAS, MUKIM BATU, KUALA LUMPUR UNTUK TETUAN

MALAYSIA LAND PROPERTIES SDN. BHD.

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Extension of Time

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Referring to the above, your request for Extension of Time and all the information available to us, we would like to inform that the Developer is entitled for Extension of Time up to 29th August 2008.

In accordance to Clause 30 of the Sale and Purchase Agreement, the reasons for Extension of Time are mainly due to:

a….delays caused by the Contractor(s) involved in the construction…

b….Act of God…

c…. inclement weather…

d….shortage of materials…

e. Any other circumstances of whatsoever nature beyond the control of the Vendor…

Thank You.

Yours faithfully

AJS ARCHITECT

Sgd

ALAN J.S.SU

Architect

**[11]** Counsel for the respondent contended that none of the four reasons set out in the certificate could be relied on by the appellant as they are not reasons, save for inclement weather, contemplated under the force majeure (cl 30) provision. Importantly, counsel submitted that in any event the appellant had failed to produce documentary evidence necessary to support any of the reasons set out by the architect.

**[12]** The court is of the view that the certificate is final and conclusive and binding on the respondent for the following reasons:

(a) to begin with, cl 22.1 of the sale and purchase agreement envisaged and provided for extension of time to be granted by the architect in situations deemed appropriate by the architect;

(b) notwithstanding that time shall be the essence of the sale and purchase agreement (cl 8), cl 22.1 clearly gave the power to grant extension of time to the architect for good reason;

(c) the force majeure cl (cl 30) is not limited to the general notion of delay caused by 'act of God, strikes, lockouts, riots, civil commotion, general chaos and inclement weather' only. The words force majeure have been held in many cases to have a more extensive meaning than 'act of God' or 'vis major'. While the concept of force majeure does not encompass conditions of business or economic climate leading to a depressed economy, it would include dislocation of business by various actions and events. (see *Global Destar (M) Sdn Bhd v Kuala Lumpur Glass Manufacturers Co Sdn Bhd* [2007] MLJU 91; [2007] 1 LNS 54);

(d) Counsel for the respondent cited the following cases to stress the point that the reasons given by the architect of (a) delays caused by the contractors involved in the construction and (d) shortage of materials cannot come within the ambit of cl 30:

(i) *Golden Bay Realty Pte Ltd v Orchard Twelve Investments Pte Ltd* [1989] 2 MLJ 70; [1990] 3 CLJ (Rep) 499 where the Court of Appeal of Singapore held that the force majeure clause does not come into play where the delays caused were within the contemplation of the appellant and were within their control. In this case the court held that a vendor is not entitled to claim protection under the force majeure clause if he 'had in fact under provided the time required to do the necessary things' nor would the expression 'any other cause or causes over which the vendor has no control' be wide enough to excuse the appellant for the delays of their consultants;

(ii) *Araprop Development Sdn Bhd v Leong Chee Kong & Anor* [2008] 1 MLJ 783; [2008] 1 CLJ 135 where the Court of Appeal held that the delay to deliver vacant possession was not a delay as stipulated by the exclusion clause ie, cl 22 of the sale and purchase agreement. The delay was by the appellant's subcontractors who were under the control of the appellant.
For ease of reference, cl 22 of the sale and purchase agreement is reproduced here:

> '… Vendor shall not be liable to the purchaser for any failure on its part to fulfil any term herein if such fulfillment is delayed, hindered or prevented by circumstances beyond the Vendor's control including … delay by the Appropriate Authority(ies) in granting any necessary sanction or approval or in completing their work on the said Land and other circumstances of whatever nature beyond the Vendor's control' and

(iii) *Getaran Unggul Sdn Bhd v Syed Ahamed bin Mohamed Ghani and others* [2004] MLJU 485; [2004] 1 LNS 436 where the High Court held that the stop-work order issued by Majlis Perbandaran Pulau Pinang did not fall within the force majeure clause;

But it will be noted however, that in none of the above cited cases, was there a clause equivalent to cl 30 which provided that the certificate was final, conclusive and binding on the respondent;

(e) in his submission counsel for the respondent also contended that the appellant had failed to produce documentary evidence to support or justify the reasons stated by the architect in the certificate. This contention, as accepted by the learned judge, is not quite correct as the architect had in his letter dated 16 July 2009 to the appellant (*Rekod Rayuan* p 175) attached a summary stating the reasons for the grant of extension of time to the appellant (*see Rekod Rayuan* pp 176–187). The architect had also stated in his letter that 'the information could be made available to any particular purchaser who request for it'. It is obvious that in this case, the respondent did not request for particulars or documents from the appellant and/or the architect to show that there was no basis for the architect to issue the certificate. In the face of the certificate and the conclusive and binding nature of cl 30 it would have been prudent, indeed incumbent, on the respondent to apply for further and better particulars and/or discovery of documents before the trial. Unfortunately, the respondent did not do so. This is certainly not a case where the court ought to have invoked an adverse inference against the appellant under s 114(g) of the Evidence Act 1950 for having failed to produce documents in court;

(f) as mentioned earlier, a perusal of the cases cited by counsel for the respondent will immediately show that the agreements under consideration by the court in those cases did not contain a 'final and conclusive and binding clause' as is applicable in the present case. Quite apart from including the force majeure clause in the agreements there was no other provision for the architect or other person on behalf of the vendor/developer, to seek exclusion from liability on the strength of a certificate issued by the architect or a similar person;

(g) the court is of the view that in light of the certificate, it is deemed conclusive that the reasons for the delay in the completion and delivery of vacant possession of the unit are as stated in the certificate. The court cannot and is not at liberty to go behind the certificate to question its validity in the absence of any evidence to suggest that the certificate was issued as a result of, inter alia, fraud, misrepresentation or mala fides. It is trite that the court should not intervene to rewrite the terms and conditions of the sale and purchase agreement willingly accepted by the respondent when it entered into the agreement with the appellant;

(h) in the case of *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587; [1997] 1 CLJ 23, Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court of Appeal said it is for the parties who intend to be bound by mutual obligations to make a contract for

themselves. It is outside the scope of judicial power to make one for them and where a contract is couched in unambiguous language, the court must give effect to it. The court must give effect to the plain meaning of the words, no matter how distasteful the result may be (see the *Central Bank of India Ltd v The Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288);

(i) on the use of 'conclusive evidence clauses' in business and commercial agreements, it was held by Yong Pung How J (as he then was) in the Singapore High Court case of *Bangkok Bank Ltd v Cheng Lip Kwong* [1990] 2 MLJ 5 that where parties agree that a designated person will have power to issue a certificate as evidence of a fact, the issuance by him of the certificate is then conclusive evidence of that fact, as between the parties. The learned judge went on to say that, in the absence of fraud or obvious error on the face of it, a certificate issued under a 'conclusive evidence clause' is conclusive of both the liability and the amount of debt. The *Bangkok Bank Ltd*'s case was later applied by Ramli Ali JC (now JCA) in *Bank of Tokyo-Mitsubishi (Malaysia) Bhd v Sim Lim Holdings Bhd & Ors* [2001] MLJU 125; [2001] 2 CLJ 474;

(j) in the present case, the learned High Court judge fell into error when she rejected the certificate as being invalid on the ground that the reasons stated in the certificate could not be substantiated and thus not conclusive and final;

(k) while the court is mindful that a party relying on a force majeure clause must prove the facts bringing the case within the clause (see *Intan Payong Sdn Bhd v Goh Saw Chan Sdn Bhd* [2005] 1 MLJ 311; [2004] 1 LNS 537), the court is of the view that in the present case the facts relied on by the architect are as contained in his report summary. It is because of the existence of the final and conclusive and binding clause that the court is constrained from determining the reasons proferred by the architect in detail. Suffice to say that unless the respondent can demonstrate that the certificate issued was manifestly erroneous or was issued with mala fides, the certificate will have to be accepted by the court;

(l) on this point, the court notes that the respondent apart from pleading in his reply and submitting that there were no events that could come within the force majeure clause, did not challenge the validity of the certificate under the final, conclusive and binding effect of cl 30;

(m) Counsel for the respondent contended that as the architect's report was issued on 16 July 2009; that is, about one year after the delivery of vacant possession on 1 August 2008, the report was an afterthought and no weight ought to be attached to it. The court is of the view that this argument is without merit as there is no provision in the Sale and purchase agreement that requires the appellant to issue the certificate for

extension of time before the delivery of vacant possession and further it was stated by the architect ('DW2') in evidence that the extension of time could only be made after the project had been completed as time was needed to ascertain the reasons for the delay of the completion of the project. As such it could not be said to have been issued as an 'afterthought' after the delivery of vacant possession; and

(n) the court is also of the view that there is no ground for the respondent to impugn the certificate on the basis that it is only in the form of a letter from the architect. There is no provision in the sale and purchase agreement or under the law for the certificate issued to be in compliance with a certain standard format. In the absence of any such specific requirement the court sees no reason why it should not accept the architect's letter dated 12 September 2008 as a valid certificate.

**[13]** In the result, the appeal was allowed with costs and the decision of the High Court set aside.

*Appeal allowed with costs.*

Reported by Kohila Nesan